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**AMBANK (M) BHD**

**v.**

**ABDUL RAHIM OSMAN & ANOR**

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HIGH COURT MALAYA, IPOH
HARMINDAR SINGH DHALIWAL J
[ORIGINATING SUMMONS NO: 24F-1270-12-2012]
7 NOVEMBER 2013

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***LAND LAW:*** *Charge - Order for sale - Cause to the contrary - Whether established - Whether borrower defaulted in payment - Whether borrower adjudicated bankrupt - Whether interest claimed from day of receiving order until day order of sale made - Whether entitled - Whether security realised within six months - Whether amount claimed lawful - National Land Code, s. 256(3) - Bankruptcy Act 1967, s. 8(2A)*

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The plaintiff applied, *inter alia*, for an order that two properties located in Teluk Intan, Perak ('the said properties') be sold by way of public auction pursuant to s. 256 of the National Land Code ('NLC'). One Osman bin Mohd Rais, now deceased ('the borrower'), was the

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registered owner of the said properties. Sometime in 1993, the plaintiff granted the borrower a housing loan of RM100,000 for the purpose of purchasing the said properties. The said facility was secured by a charge over the said properties. Subsequently, the loans were duly disbursed to the borrower. However, the borrower was in default until the total

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outstanding debt owing under the loan facility as at 26 June 2005 stood at RM410,161.39. A letter of demand dated 6 August 2005 was sent to the borrower. It later transpired that the borrower died on 15 October 2005. Meanwhile, the loan account continued to be in default as no payments were forthcoming. By a statutory notice pursuant to Form 16D of the NLC, the plaintiff requested the personal representatives of the

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deceased borrower to remedy the breach within seven days from the date of receipt. The plaintiff then filed this application and claimed RM424,097.18 as at 15 October 2005, which was the date the borrower had died. In a further affidavit filed by the plaintiff in purported compliance with O. 83 r. 3 Rules of Court 2012, it was asserted that

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the amount due as at 22 July 2013 was RM1,024,865,02. However, it was also transpired that the borrower had been adjudged a bankrupt way back on 14 April 1994, *ie*, soon after the loan facility was disbursed to him. *Vide* this application, the defendants resisted the order for sale on the grounds, *inter alia*, that the plaintiff was claiming for all interest from

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the day of the receiving order until the day the order of sale was made. This, they alleged, amounted to cause to the contrary.

**Held (dismissing plaintiff's application with costs):**

**(1)** The effect of any receiving order made against a bankrupt was set out in s. 8 of the Bankruptcy Act 1967. A secured creditor may realise his security against a bankrupt, but it should be done within six months of the receiving order being made in order to be entitled to any interest in respect of the debt owed by the bankrupt. This was to prevent secured creditors from taking an inordinately long time to realise the property resulting in the debtor having to bear interest until the sale was completed. Since the plaintiff had failed to realise their security within six months, they could not be entitled to any interest after the receiving order was made. (paras 7-9)

**(2)** In order to resist the granting of an order for sale, the defendant had to show that a cause to the contrary existed. The burden was on the chargor to show "cause to the contrary" as contemplated by s. 256(3) of the NLC. The amount claimed in the 16D notice were not lawfully due as there was an infringement of s. 8(2A) of the Bankruptcy Act 1967. Since the conditions precedent to the granting of an order for sale were not complied with, it would follow that the plaintiff was disentitled from obtaining an order for sale of the charged property. However, the plaintiff was at liberty to commence fresh proceedings by stating the amounts that were lawfully due in his notice to the debtors. In the circumstances, the defendant had succeeded in establishing a cause to the contrary within s. 256(3) of the NLC. (paras 5, 11 & 13)

**Case(s) referred to:**
*Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC* ***(refd)***
*Pilecon Realty Sdn Bhd v. Public Bank Bhd & Ors and Other Appeals [2013] 2 CLJ 893 FC* ***(refd)***

**Legislation referred to:**
Bankruptcy Act 1967, ss. 8(2A), 28
National Land Code, ss. 256(3), 340
Rules of Court 2012, O. 83 r. 3

*For the plaintiff - Chandrasegaran Panjacharan; M/s BH Gan, Nor & Kim*
*For the defendants - Zaizuraimy Abd Rahim; M/s Mior Raimy Fuaad & Aqis*

*Reported by Sandra Gabriel*

## JUDGMENT

**Harmindar Singh Dhaliwal J:**

**[1]** This is an application by the plaintiff bank, *inter alia*, for an order that the properties held under Geran No. 23138, Lot No. 4126 and Geran No. 41532, Lot No. 3511 located at Teluk Intan, District of Hilir

Perak, Perak ("the said properties") be sold by way of public auction pursuant to s. 256 of the National Land Code ("NLC"). The defendants are resisting the application for an order for sale on several grounds.

**Background Facts**

**[2]** The facts as revealed in the affidavits can be stated as follows. One Osman bin Mohd Rais, now deceased ("the borrower"), was the registered owner of the said properties. Sometime in 1993, the borrower was granted by the plaintiff a housing loan of RM100,000 for the purpose of purchasing the said properties. The said facility was secured by a charge over the said properties registered on 5 May 1993. The said loans were duly disbursed to the borrower.

**[3]** Subsequently, the borrower was in default until the total outstanding debt owing under the loan facility as at 26 June 2005 stood at RM410,161.39. Although a letter of demand dated 6 August 2005 was sent to the borrower, it later transpired that the borrower died on 15 October 2005. Meanwhile, the loan account continued to be in default as no payments were forthcoming.

**[4]** By a statutory notice dated 1 November 2012 pursuant to Form 16D of the NLC, the plaintiff requested the personal representatives of the deceased borrower to remedy the breach within seven days from the date of receipt. This was met with no response. The plaintiff then filed this application. The amount that was claimed in the notice as well as in the originating summons was RM424,097.18 as at 15 October 2005, that is, the date on which the borrower had died. In a further affidavit filed by the plaintiff in purported compliance with O. 83 r. 3 Rules of Court 2012, it was asserted that the amount due as at 22 July 2013 was RM1,024,865.02. However and significantly as it would appear later on, it also transpired that the borrower had been adjudged a bankrupt way back on 14 April 1994, that is, soon after the loan facility was disbursed to him.

**The Law**

**[5]** The governing principle which applies in relation to foreclosure proceedings is to be found in s. 256 of the NLC in that in order to resist the granting of an order for sale, the defendant has to show that a cause to a contrary exists. The Supreme Court in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36; [1997] 1 AMR 1036 ruled that the burden is on the chargor to show "cause to the contrary" as contemplated by s. 256(3) of the NLC. The Supreme Court also held that such cause to the contrary can be established in three categories of cases, that is:

(i) If the chargor is able to bring his case within any of the exceptions to the indefeasibility doctrine set out in s. 340 NLC;

(ii) If there is failure by the chargee to meet the conditions precedent for the making of an application for an order for sale; and

(iii) If the grant of the order for sale would be contrary to some rule of law or equity.

**[6]** By his affidavit in reply, the defendant has sought to raise basically two issues, namely the question of what is the correct and lawful amount that the plaintiff bank is entitled to claim and the issue of limitation.

**Cause To The Contrary**

**[7]** Now the first issue relates to the bankruptcy of the borrower on 14 April 1994. The effect of any receiving order made against a bankrupt is set out in s. 8 of the Bankruptcy Act 1967 as follows:

**8. Effect of receiving order.**

(1) On the making of a receiving order the Director General of Insolvency shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court and on such terms as the court may impose.

(2) This section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed nor shall it operate to prejudice the right of any person to receive any payment under or by virtue of s. 31 of the Employment Act, 1955 [Act 265] of the States of Peninsular Malaysia or any corresponding provisions in Sabah and Sarawak.

(2A) Notwithstanding subsection (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realize his security within six months from the date of the receiving order.

(3) On a receiving order being made against a debtor he shall, within 24 hours after such order has been served upon him file an affidavit in the office of the Director General of Insolvency, containing a true and correct statement of the names and residences of all the partners, if any, in his business and of his

principal assets and liabilities. Such statement shall for the purposes of this Act be deemed to be part of the debtor's statement of his affairs referred to in s. 16.

(4) On such order as aforesaid being made against a debtor the Director General of Insolvency shall forthwith take possession of all books of account and other papers and documents in the possession, custody or control of the debtor relating to his property or affairs, and may take into his possession all or any deeds, books, documents and other property of the debtor.

**[8]** What this means in a nutshell is that a secured creditor may realise his security against a bankrupt but that he should do so within six months of the receiving order being made in order to be entitled to any interest in respect of the debt owed by the bankrupt. The rationale for this as explained in *Pilecon Realty Sdn Bhd v. Public Bank Bhd & Ors and Other Appeals* [2013] 2 CLJ 893 is to prevent secured creditors from taking an inordinately long time to realise the property resulting in the debtor having to bear interest until the sale is completed.

**[9]** Now since the plaintiff in the instant action has failed to realise their security within six months, they cannot be entitled to any interest after the receiving order was made. It can hardly be disputed that the plaintiff here is claiming all the interest from the day the receiving order was made on 14 April 1994 until the day the order for sale is to be made. Needless to say, this is a clear violation of s. 8(2A) of the Bankruptcy Act 1967.

**[10]** The plaintiff appears to concede as much as at the last minute an affidavit was filed to show the amount due to be RM110,834.37 as at 14 October 1994. However, this last act is insufficient to regularise the legitimacy of the claim for an order for sale. In this regard, in the case of *Low Lee Lian*, *supra*, Gopal Sri Ram JCA (as he then was) in speaking for the Supreme Court stated:

> Secondly, a chargor may show cause to the contrary within s. 256(3) of the Code by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale. For example, failure on the part of the chargee to prove the making of a demand or service upon the chargor of a notice in Form 16D would constitute cause to the contrary. So too, where the notice demands sums not lawfully due from the chargee. See, *Co-operative Central bank Ltd. v. Meng Kuang Properties Bhd* [1991] 2 MLJ 283. However, in such a case, it would be open to the chargee to subsequently serve a notice or proper notice (as the case may be) before commencing proceedings afresh as the cause shown to the contrary does not in substance affect the chargee's right to apply for an order for sale.

**[11]** In the instant action, it would appear to be the case that the sums claimed in the 16D notice were not lawfully due as there was an infringement of s. 8(2A) of the Bankruptcy Act 1967 as alluded to earlier. Since the conditions precedent to the granting of an order for sale were not complied with, it would follow that the plaintiff is disentitled from obtaining an order for sale of the charged property. However, as alluded to in *Low Lee Lian*, the plaintiff is at liberty to commence fresh proceedings by stating the amounts that are lawfully due in his notice to the debtors.

**[12]** On the question of limitation, since the defendants have succeeded on the issue of the amounts that are lawfully due to the plaintiff, the argument has become moot and can be raised again if there are fresh proceedings. This will of course depend upon the amount being claimed and the period from which the limitation period ought to commence.

## Conclusion

**[13]** In the circumstances and for the reasons stated in the foregoing, the defendant has succeeded in establishing a cause to the contrary within s. 256(3) of the NLC. Accordingly, the originating summons of the plaintiff is dismissed with costs assess at RM5,000.